1989

State of Utah v. Ernst Robert Miller : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 890459-CA
v.	:	
ERNST ROBERT MILLER,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF DISTRIBUTION OF A COUNTERFEIT SUBSTANCE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1986), IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILLIP EVES, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of distribution of a counterfeit substance, a second degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1986). The conviction resulted from a jury trial in the Fifth Judicial District Court, the Honorable J. Phillip Eves, Judge, presiding.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES

The sole issue on appeal is whether there was sufficient evidence to support defendant's conviction.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following provisions are pertinent to resolution of the issues on appeal.

Utah Code Ann. § 58-37-8(1) (Supp. 1989):

> Prohibited acts A -- Penalties:
> (a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense; or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except under an order or prescription; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating

Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony . . . [.]

Utah Code Ann. § 58-37-2(5) (Supp. 1987):

"Counterfeit substance" means:

(a) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(b) any substance that is represented to be a controlled substance.

STATEMENT OF THE CASE

Defendant, Ernest Robert Miller, was charged with distribution of a counterfeit substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1989). On May 12, 1989, a jury found him guilty as charged. Defendant was

sentenced to one to fifteen years in the Utah State Prison. Execution of the sentence was stayed and defendant was placed on three years probation. As a condition of probation defendant served 15 days in the Iron County Jail and was ordered to comply with other specified probation terms. Defendant filed his notice of appeal on July 20, 1989.

STATEMENT OF FACTS

On the evening of July 20, 1988, Patrick McCarthy, a narcotics agent for the State of Utah, entered the Sportmen's Bar in Cedar City, Utah, for the purpose of conducting a narcotics investigation (T. 43). There, by prearrangement, he met a confidential informant and subsequently approached defendant, asking if defendant knew anybody in the bar who could procure some "speed," a slang term for the controlled substance amphetamine (T. 44-45, 47). Defendant replied that he did not know anybody at the moment but that he would check around. Approximately 15 minutes later defendant returned and said to Agent McCarthy, "I can get you some speed, but all I have are some cross tops, and they're my own, and they're at my house, and I can't get them for you until after the bar closes." (T. 47-48).

After the bar closed, at approximately 1:00 a.m., July 21, 1988, Agent McCarthy and the confidential informant followed defendant to defendant's home where defendant gave them approximately ten double-scored white tablets. Defendant did not charge Agent McCarthy for the pills but said that he could sell Agent McCarthy more at a cost of $20 for 200 (T. 49-51).

Agent McCarthy submitted the pills he had received from defendant to the Utah State Crime Lab for identification, and it was determined that they contained no controlled substances. Defendant subsequently was arrested and charged with distribution of a counterfeit substance.

At trial Agent McCarthy, who had had 12 years of experience as a narcotics officer in California and 16 months in narcotics in Utah, testified concerning the practice of using slang terms to describe illicit drugs (T. 40, 53-55). In the 200-300 cases he had worked on involving "speed," the term, when referring to a substance in tablets form, meant an amphetamine. Other terms used to describe a tablet form of amphetamine were "cross tops" and "go fasts." (T. 46, 47, 52). Agent McCarthy further testified that in his experience the non-controlled substances ephedrine, pseudoephedrine and caffeine were described as "speed" only if the person offering such substances was trying to sell a phony or counterfeit product as an amphetamine (T. 51, 52). Agent McCarthy also stated that the price quoted to him by defendant for the purchase of more cross top tablets, 200 for $20, was a fair price for amphetamines (T. 51).

Kevin Lee Smith, the Utah State Criminologist who analyzed the tablets received from defendant, testified that when he receives a white scored tablet for analysis, he checks for amphetamine. He stated that "[i]f there is going to be a controlled substance in a white scored tablet, it's going to be amphetamine. In one case, I found a barbituate in a white double-scored tablet, but that's an exception" (T. 95, 96). Mr.

Smith's analysis of the tablets in question indicated that they contained only ephedrine, a non-controlled substance.

SUMMARY OF ARGUMENT

Applying the applicable standards of review, there was sufficient evidence to support defendant's conviction of distribution of a counterfeit substance.

ARGUMENT

THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF DISTRIBUTION OF A COUNTERFEIT SUBSTANCE.

Defendant argues that evidence submitted by the State at trial was insufficient to support a conviction of distribution of a counterfeit substance under Utah Code Ann. § 58-37-8 (1986) on the grounds that: (1) the use of slang terms to describe specifically defined substances is inexact and confusing, and (2) the statute governing the distribution of counterfeit substances is unconstitutionally vague.

The Utah Supreme Court has established the standard of appellate review of the sufficiency of evidence needed to support a jury verdict in a criminal case. In State v. Booker, 709 P.2d 342, 345 (Utah 1985), the Court stated:

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.
>
> In reviewing the conviction, we do not substitute our judgment for that of the jury.

> "It is the exclusive function of the jury to weigh the evidence and to determine the *credibility of the witnesses* . . . ." . . . So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops. . . .

(citations omitted). See also State v. Pacheco, 778 P.2d 26, 30 (Utah Ct. App. 1989).

At trial the State presented two expert witnesses, Utah State Narcotics Agent Patrick McCarthy and Utah State Criminologist Kevin Lee Smith. They testified to the use, terminology and identification of controlled substances, in particular the substance amphetamine.

Agent McCarthy, a 13 year veteran of narcotics enforcement, testified to the prevailing street use of slang terms to describe controlled substances over use of their designated pharmaceutical names. He unambiguously stated that the terms "speed" and "cross tops," as used in his conversation with defendant and in other drug transactions, referred to the substance amphetamine. Defendant argues that Agent McCarthy testified that the terms "speed" and "cross tops" are diametrically opposed. That assertion is not supported by the record. The portion of the transcript in question reads a follows:

> A. [Agent McCarthy] . . . He [referring to defendant] didn't state to me, "I don't have any speed, but I have some cross tops." What he stated was, "I have some cross tops at my house that are my own personal ones, but it has to be after the bar closes."
>
> Q. [Defendant's Counsel] But you're sure he didn't say, "I don't have any speed, but I do have some cross-tops."

> A. [Agent McCarthy] I know he didn't say that because that would have stuck in my mind. To me, those are diametrically opposed terms.

(T. 62, 63). Read in context, it is clear that Agent McCarthy meant that referring to "speed" and "cross tops" as different substances would have stuck in his mind, that such identification was diametrically opposed to his understanding of the meaning of those terms. As corroboration for his understanding that his transaction with defendant involved amphetamines, Agent McCarthy testified that defendant's quoted price of $20 for 200 (or $10 for 100) more tablets was a fair price for amphetamines and indicated to him that defendant was offering amphetamines (T. 51). Agent McCarthy's testimony concerning his conversations with defendant and use of slang terminology was consistent and clear throughout his examination at trial.

State Criminologist Kevin Lee Smith's testimony that if a controlled substance appeared in a double scored tablet it would be amphetamine compliments Agent McCarthy's testimony. Agent McCarthy believed that his transaction with defendant involved the controlled substance amphetamine by virtue of terminology used and the physical appearance of the procured tablets. Mr. Smith confirmed that the physical appearance of the tablets could lead one to believe that an amphetamine was present.

The fact that the jury was persuaded by Agent McCarthy's testimony and found defendant guilty of distribution of a counterfeit substance carries great weight. As noted supra,

an appellate court in this state will substitute its own judgment for that of the jury "only when the evidence . . . is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." Booker, 709 P.2d 342, 345. In the instant case, the evidence presented fell well within the Utah Supreme Court standard and was sufficient to support defendant's conviction.

Defendant also argues that the statute(s) governing distribution of a counterfeit substance might be constitutionally suspect. However, defendant admits that he can find no support for a constitutional challenge to the statute(s) in question. Defendant cites State v. Moore, 674 P.2d 354 (Colo. 1984), a Colorado case that upheld the constitutionality of that state's statute governing controlled substances, in support of that position. Although the Colorado statute in question is sufficiently dissimilar to the Utah statute to make any meaningful comparison of the two untenable, the State agrees with defendant that a constitutional attack on Utah Code Ann. § 58-37-8 (1986) or § 58-37-2(5) (Supp. 1987) (defendant never specifies which statute might be constitutionally suspect) cannot be supported. There appear to be no Utah cases attacking the constitutionality of either statute applicable to the instant case. However, the Utah Supreme Court has established standards for reviewing the constitutionality of any statute. In Trade Comm'n v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 436-37, 446 P.2d 958, 961-62 (1968), the Court held that a statute must

"clearly violate some constitutional provision, and further, the violation must be clear, complete and unmistakable" and that in examining statutory constitutionality the court must apply every reasonable presumption favoring constitutionality in deference to legislative prerogative to enact law. See also State v. Tolman, 775 P.2d 422, 425 (Utah Ct. App. 1989), cert. denied, ___ P.2d ___ (Utah Oct. 24, 1989). Moreover, the "party attacking the constitutionality of a statute must affirmatively demonstrate its unconstitutionality." Rio Algom Corp. v. San Juan County, 681 P.2d 184, 191 (Utah 1984). See also Tolman, 775 P.2d at 425. Defendant's failure to meet his burden of affirmatively demonstrating the statute's unconstitutionality, coupled with this Court's deference to legislative prerogative, undermines defendant's challenge.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction of distribution of a counterfeit substance.

DATED this 13th day of December, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent, were mailed, postage prepaid, to James L. Shumate, attorney for defendant, 110 North Main, Suite H, P.O. Box 623, Cedar City, Utah 84720, this 13th day of December, 1989.